UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of

KAWA SUSHI, INC. D/B/A KAWA SUSHI RESTAURANT

and

Case No. 02--CA-039736

318 RESTAURANT WORKERS UNION

EXCEPTIONS TO THE DECISION OF ADMINISTRATIVE LAW JUDGE MICHAEL A. MARCIONESE ON BEHALF OF RESPONDENT KAWA SUSHI, INC.

Respectfully submitted,

Susan G. Papano The Law Offices of Scott B. Tulman & Associates, PLLC Attorneys for Respondent 369 Lexington Avenue Suite 1500 New York, New York 10017 (212)867-3600 Respondent Kawa Sushi Inc., d/b/a Kawa Sushi Restaurant ("Respondent" or "Restaurant")¹ submits these Exceptions to the September 19, 2012 recommended Decision, Order and Notice issued by Administrative Law Judge Michael A. Marcionese (hereinafter, the "ALJ" and his decision, the "ALJD").

FACTS

On December 1, 2009, delivery worker Wen Dong Lin assaulted fellow delivery worker and Union member De Quan Lu inside Respondent Restaurant. The incident "began as a dispute over two deliveries." ALJD p. 6, lines 21. The ALJ found that De Quan Lu "conceded that he had a dispute with Lin over tips which may have led Lin to hit him." Id. at lines 38-39. Wen Dong Lin testified that it was a case of self-defense. ALDJ p. 6, lines 26-31.

The Court made no finding on the issue of either man's culpability, but appeared to give more credence to Wen Don Lin's version of the incident. However, the physical disparities of the two men during their respective testimony at trial – Wen Dong Lin is at least thirty years younger, a head taller and much more muscular than De Quan Lu – as well as Wen Dong Lin's own description of the altercation at trial – should have led lead a reasonable finder of fact to conclude that Wen Dong Lin's use of force was not justified, and would alone be sufficient for Wen Dong Lin's termination.

Wen Dong Lin's own testimony established that Wen Dong Lin started the fight. He admitted at trial that he noticed that De Quan Lu was about to take two delivery orders, "one going east and one going west." Tr. page 122, line 4. He asked De Quan Lu, "You would deliver everything, then what do I deliver?" Tr. page 123, line 7.

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¹ Kawa Sushi, Inc. is now reincorporated as Kawa Sushi 8th Ave., Inc.

He continued, "And after [De Quan Lu swore at him], he wanted to go. I didn't let him go. And I said you have to apologize to me . . . Tr. page 123, lines 16-18.

Wen Dong Lin also admitted that "I held onto" the two orders, which De Quan Lu was also holding. "And then when I held onto the two orders, so he, he let go and then went to get the [stapler]." Tr. page 123, lines 22-25. "And he wanted to hit me and I fend off. And then [he] slowly sat down and lay on the floor. And Yi Feng came out [while De Quan Lu was still on the floor], asked lady to call police." Tr. page 124, line 25 – page 125, line 2.

The owner of the Restaurant, Yi Feng, did not see the actual assault. Following the incident, De Quan Lu remained out on medical leave for over a month. During that time he retained a lawyer and commenced a civil action against Wen Dong Lin.

Wen Dong Lin testified that on January 11, 2012, he was told by Yi Feng "not to come back to work because Lu had retained a lawyer." ALJD at p. 11, lines 21-22.

Ms. Wong: What did they – what did they say to you

[on January 11th]?

Wen Dong Lin: They said Lu had asked, had sought out a lawyer

in filing the case against me. And every time there was someone calling the restaurant asking about Lu and that would affect business, so they want me to go talk with Lu to resolve the issue, then

come back.

Tr. pp. 128, line 23 to p. 129, line 2 (emphasis added).

The ALJ held that "the evidence is insufficient to establish a violation of the Act" for Wen Dong Lin's discharge on that date, "and counsel for the Acting General Counsel concedes as much in her brief." Id., lines 22 – 24.

The ALJ did not express any opinion regarding whether Yi Feng would have been at all unreasonable in accepting De Quan Lu's version of the facts (that it was an unprovoked assault by Wen Dong Lin), or being concerned that terminating De Quan Lu – who the ALJ described as "melodramatic" and "eager to portray himself as a victim," as well as having "self-proclaimed status" in the Chinese Staff and Workers Association – would incur the wrath of the Association, the Union or the Chinese community. ALDJ at p.6, line 35, to 7, line 2.

On or about February 1, 2010, the two men appeared in criminal court. Their respective criminal cases were dismissed. Wen Dong Lin testified that two days later, he went to the Restaurant to ask Yi Feng for his job back. According to Wen Dong Lin, Yi Feng told him that regardless of what the criminal court Judge had done, he could not return to work until he worked things out with De Quan Lu. Then Yi Feng allegedly told him to leave and come back in a few minutes because he was busy. Wen Dong Lin's testimony was as follows:

Ms. Wong: After the court dismissed the summonses, did you

attempt to get your job back?

Wen Dong Lin: Yeah, after the court, about two or three hours

afterwards, I called Yi Feng and I said I have resolved the issue with Lu, when are you going to hire me back?

Q: Continue.

A: Yi Feng replied and said I don't know if you have resolved this issue, whatever judge said is none of my business; between you and Lu, you have to resolve then

issue, and then after that is resolved you can come back.

I don't understand why he said that.

Q: And how did the phone call end?

- A: And I said the judge already said there was nothing between Lu and me. And he said I am very busy now, and then he hung up.
- Q: And after talking to Yi Feng over the phone, did you attempt to get your job back a second time?
- A: Yes, two days after that [approximately February 3, 2010] I went back to Kawa Sushi and I tried to talk with Yi Feng. And I asked him I have already resolved the issue between Lu and I, when are you going to hire me back. And Yi Feng still said the same thing. He said after the issue between you and Lu are resolved, then you can come back. And I said, why, the judge already made the order, what else do you want me to talk with Lu [sic]. And Yi Feng said that whatever the judge's decision is not my business. You have to talk to, to have resolution with Lu, De Quan Lu. I am very busy now, you can come back in a few minutes.

Tr. pp. 130, line 20 through 131, line 22.

According to Wen Dong Lin, he left the Restaurant and stood on a picket line which had commenced in November, 2009, on behalf of another employee, Tian Wen Ye.² A few minutes later, he allegedly walked back inside the Restaurant, and again asked for his job back. This time, Wen Dong Lin claimed, the Restaurant owner gave him a totally different reason for his discharge, stating, "You have already stood on the picket line of Tian Ye. Why should I rehire you?" He then was chased out of the Restaurant.

On February 14, 2010, De Quan Lu was allowed to return because he pleaded for his job back. He testified that his civil action against Wen Dong Lin remained pending as of the trial. **Tr.** . Meanwhile, on February 12, 2010, the Union filed a charge against Respondent, which culminated in a four-day trial before the Administrative Law Judge Marcionese. The ALJ held that Respondent had violated Section 8(a)(1) of the Act by

 $^{^2}$ Tian Wen Ye had been terminated in November, 2009, for refusing to make a delivery. Wen Dong Lin had stood on the line on numerous occasions, during working hours, prior to his altercation with De Quan Lu.

refusing to reinstate Wen Dong Lin because he had participated in a protest of another employee's discharge.

Respondent does not dispute that Wen Dong Lin's picketing was protected activity under the Act, or that Respondent was aware of such activity. Respondent takes exception to The ALJ's finding that the foregoing alleged statement by Ye Feng was evidence of animus, and that Respondent had failed to uphold its burden of establishing that it would have taken the same action against Wen Dong Lin even in the absence of his protected activity. The ALJ concluded that Wen Dong Lin's non-reinstatement violated Section 8(a) (1) of the Act, based upon the ALJ's application of Wright Line Inc., 251 N.L.R.B. 1083, 1089 (1980), enforced, 662 F.2d 899 (1st Cir. 1981).

For the following reasons, and noting the following exceptions, Respondent believes that the ALJ's findings of fact and conclusions of law are not supported by a preponderance of evidence in the record and are contrary to law. Specifically, Respondent contends that Wen Dong Lin's picketing on February 3, 2010 was totally irrelevant to Respondent's decision not to rehire him. Respondent had made it abundantly clear to Wen Dong Lin prior to his picketing activities that he would not be rehired until he resolved things with De Quan Lu and he did not do so. Thus, not only did the ALJ fail to establish either animus or any logical causal connection between the picketing or Wen Dong Lin's nonreinstatement, but the ALJ also incorrectly found that Respondent would have taken the same action absent Wen Dong Lin's picketing activities. Accordingly, as specified in the following Exceptions, the Board should reject the recommended Decision, Order and Notice issued by Administrative Law Judge Marcionese.

EXCEPTIONS

THE ALDJ DID NOT PROPERLY ANALYZE THE FACTS SURROUNDING WEN DONG LIN'S NONREINSTATEMENT UNDER WRIGHT LINE

Wright Line, Inc, 251 N.L.R.B. 1083, 1089 (1980), enforced, 662 F.2d 899 (1st Cir. 1981) (hereinafter, "Wright Line"), requires the ALJ to apply a burden-shifting framework to determine whether an employer violated the Act by disciplining or terminating an employee.

According to <u>Wright Line</u>, to sustain its unfair labor practice charge, the General Counsel has the initial burden of proving a *prima facie* case by showing that Wen Dong Lin's alleged protected activity was a "substantial or motivating factor " in Respondent's decision not to re-hire him. <u>See NLRB v. Mike Yurosek & Son, Inc.</u>, 53 F.3d 261, 267 (9th Cir. 1995).

The elements required to support a *prima facie* showing of discriminatory motivation are: (1) protected concerted activity, (2) employer knowledge, (3) a causal relationship, and (4) employer animus. The General Counsel must prove not only that the employer knew of his protected concerted, but also that the timing of the alleged reprisal was proximate to the protected activities and that there was animus to link the factors of timing and knowledge to the improper motivation. See New York University Medical Center, 324 N.L.R.B. 887, 900 (1997) and cases cited therein.

If such unlawful motivation is shown, the burden of persuasion shifts to the Respondent to prove its affirmative defense that the alleged discriminatory conduct would have taken place even in the absence of the protected activity. See Excel Corporation, 324 N.L.R.B. 416, 420 (1997); New York University Medical Center, supra, 887

Because the ALJ found that the General Counsel had established its *prima facie* case, he shifted the burden to Respondents to establish that its alleged discriminatory actions would have been undertaken regardless of the protected conduct. Respondent submits that the ALJ was incorrect both in its conclusion that the General Counsel had made out its *prima facie* case, and in its conclusion that Respondent failed to establish that it would have refused to rehire Wen Dong Lin regardless of his protected conduct.

A. The ALJ Erred in Finding A Causal Link Between Wen Dong Lin's Picketing and His Nonreinstatement.

Exception 1.

Even assuming, arguendo, that Yi Feng actually stated, "you have already picketed at the door, why should I rehire you?" (Respondent contends that it was erroneous for the ALJ to find that Yi Feng made this statement, as will be argued below), It was erroneous for the ALJ to conclude that Wen Dong Lin's after-the-fact picketing played any determinative role in Respondent's *prior* decision not to allow him back. ALJD at p. 11, line 15 - p. 13, line 3.

The ALJ's reasoning is the classic causation fallacy called *post hoc ergo propter hoc*, which means *after this therefore because of this*. The ALJ held that because the restaurant did not rehire Wen Dong Lin after he picketed, it was the picketing that caused them not to rehire him. In fact, the picketing was irrelevant - it was De Quan Lu's prior hiring of the attorney, and by obvious inference the Restaurant's wish to avoid legal problems with De Quan Lu, that caused them not to rehire him *unless and until he made amends with De Quan Lu*, as Yi Feng had stated just "a few minutes" earlier. This was based

upon Respondent's reasonable belief that Wen Dong Lin had both instigated the altercation and elevated it to a physical assault, and was therefore more culpable than De Quan Lu.

The ALJ's conclusion regarding the causal relationship of this statement to the non-rehiring can be analogized to placing a roller skate on a stairwell *after* someone has fallen and then arguing that the roller skate had caused the fall. Here, Wen Dong Lin's picketing did not cause his non-reinstatement. His failure to apologize to De Quan Lu, coupled with De Quan Lu's retention of an attorney and the Restaurant's concerns about the effects of this, caused him not to be reinstated. The fact remains to this day that Wen Dong Lin never apologized to De Quan Lu and the two men have not resolved their differences, with or without the Union's intervention.

It strains logic to try to make sense of the ALJ's position that Respondent was within its rights to terminate Wen Dong Lin in the first instance because De Quan Lu had retained a lawyer and the Restaurant did not want to hurt its business, but then lost this right not to rehire him *for the same reason*, simply because Wen Dong Lin thereafter picketed at the door. The ALJ erred in so finding.

B. The ALI erred in finding animus.

Exception 2.

The ALJ erred in finding by a preponderance of the evidence that Yi Feng even uttered the phrase, "You have already stood on the picket line of Tian Ye. Why should I rehire you?"

The ALJ relied upon similarities in Yi Feng's syntax – that it was in the form of a question, similar to a statement he allegedly made to Tian Wen Ye on the day that Tian was discharged – to establish that he had indeed made the statement to Wen Dong Lin. The

ALJ reasoned that the statement "is similar in phraseology to the statement Yi Feng admitted making to Ye when he fired him, i.e. "if you don't deliver the order, why should I hire you?" ALJD page 11, lines 5-12. This was clearly erroneous.

First, as previously stated, this statement is very similar to Wen Dong Lin's own statement to De Quan Lu: "You would deliver everything, then what do I deliver?"

Wen Dong Lin also testified that on the day of Tian Wen Ye's firing, Yi Hui called the other owner of the Restaurant and said, "I am notifying you, isn't Kawa Sushi managed by me?"

ALJD page 5, lines 12-13.

Second, Tian Wen Ye allegedly was an eyewitness to this scene outside the Restaurant. In Tian Wen Ye's affidavit, sworn to on April 14, 2010, he averred that "[Wen Dong Lin] went back inside, and then later, I saw the boss' brother-in-law Yi Bo kick Wen Dong Lin out of the restaurant. I overheard Yi Bo said, 'Why would we want you back, now that you are standing on the picket line?'" GC Exh. 11, par. 30, Tr. 134/11-17.

Tian Wen Ye's affidavit thus credits Yi Bo, not Yi Feng, with posing that question.

The ALJ's attribution of this statement to Yi Feng merely because it was in the form of a question is not supported by a preponderance of the evidence.

Exception 3.

According to Wen Dong Lin, outside the door Yi Feng again repeated, "I am not going to hire you." Tr. 134/15-19. However, Tian Wen Ye's affidavit does not mention that Yi Feng was present at all, let alone that he made this statement. If he was close enough to hear Yi Bo, then he should have been close enough to see and hear Yi Feng. See Acting General Counsel Exhibit 3, para. 30.

Nor did the Acting General Counsel ever establish that Yi Bo, who did not even work at the Restaurant, was an agent of Respondent for purposes of attributing his statement to Respondent.

Exception 4.

As Wen Dong Lin was the only witness to Yi Feng's alleged statement inside the Restaurant, his pecuniary motive to fabricate should not have been minimized. His pecuniary motive at the time he brought his case was not limited to the back pay that he would receive if he succeeded herein. The ALJ referred in passing to a prior Settlement Agreement between Respondent and Wen Dong Lin, among others, including Tian Wen Ye. ALJD p. 3, line 40 to p. 4, line 2. That Settlement Agreement stated that "in the event that [Respondent] terminate[s] a Plaintiff's employment without good cause, such Plaintiff will be entitled to recover liquidated damages in the amount of \$40,000, and all other remedies available under this Agreement or at law." ALJD p. 3, line 40 – p. 4, line 2.

The ALJ no doubt dismissed the importance of the Settlement Agreement in this case because the AGC had conceded that Wen Dong Lin's original discharge on January 11, 2010 was lawful. While it is true in hindsight that the above-quoted language is no longer applicable to Wen Dong Lin because his discharge on January 11, 2010 was lawful, in February 2010 neither party could have known this. The Settlement Agreement was still in force, and Respondent believes that it actually gave rise to what the Respondent sees as a ruse by both Wen Dong Lin and Tian Wen Ye to each collect \$40,000 from Respondent.

At the very least, the ALJ should have factored in what effect, if any, the Settlement Agreement had on Wen Dong Lin's credibility and Tian Wen Ye's credibility (he

was one of the two complainants in this case; his complaint was dismissed and he did not appeal).

In addition, the ALJ should have considered that by virtue of the Settlement Agreement Respondent was highly motivated as a matter of good business judgment to refrain from taking any action against Wen Dong Lin on the basis of his Union Activities, and had not done so since 2008. He testified as to the conflict between De Quan Lu and Wen Dong Lin, "they are Union people. I operate a business. I am scared." Tr. 13-22. He was scared not just by the fact that the two men were Union people, but by the fact that an almost daily picket line had been in operation since November, one that had been planned since the previous summer, and one that put his business under a microscope. Tian Wen Ye was one of the planners. Therefore, the ALJ's statement on this point is highly misleading. He stated, "[t]here is no dispute that, after Tian Wen Ye's termination, the Union and the Association set up a picket line outside the restaurant to protest the termination . . . "ALJD p. 5, lines 31-38.

In fact, there is great dispute about the true motive of the Union and the Association. A great deal of undisputed testimony actually established by a preponderance of the evidence that planning for the picketing began in mid-2009, and that Tian Wen Ye was front and center as the leader of this effort. A press conference had already been planned to cover the picketing, before Tian Wen Ye was terminated. The picketing was going to happen in November. There was sufficient evidence for the ALJ to conclude that Tian Wen Ye and Wen Dong Lin planned Tian Wen Ye's termination so that it could be claimed as the precipating factor for the picketing, which is in fact what happened. See, e.g., Tr. p.244, line 6 – page 248, line 25.

The ALJ should have found from the foregoing that Tian Wen Ye had and Wen Dong Lin had sufficient motive to fabricate Tian Wen Ye's discharge. This is highly relevant, not because Tian Wen Ye's termination is at issue (because it clearly is not), but because their credibility and motivation to lie was at the heart of this case. Each man was the only witness to the Restaurant's alleged wrongdoing vis-à-vis the other. Yet, the ALDJ said nothing about either man's potential to lie.

Exception 5.

As further proof of Wen Dong Lin's overriding pecuniary motive to establish that he was originally fired (or not reinstated) for cause, the Board is respectfully referred to the original charging document in this case. See General Counsel Exh. 1. According to the face of that document, it was signed by a Union representative January 22, 2010, even before the criminal court appearance at which the two men's complaints were dismissed. It was actually filed with th NLRB on February 12, 2010, before the allegedly discriminatory act of rehiring De Quan Lu over Wen Dong Lin. There is no mention of this at all in the ALJD. For the ALJ to accept Wen Dong Lin's uncorroborated, and indeed contradicted, statement over the testimony of Yi Feng flies in the face of both the preponderance of the evidence and common sense in this case.

Exception 6.

The ALJ erroneously found that a prior statement allegedly made to Wen Dong Lin by Yi Feng's wife, Yi Hui, several months earlier, indicated animus on Respondent's part. ALDJ p. 9, lines 19 – 24.

The evidence at trial established that Yi Hui worked at the Restaurant parttime, packing the food as it was prepared by the kitchen, and readying it for delivery by Wen Dong Lin and the three other delivery men who worked there. The ALJD states, "Wen Dong Lin testified that on another occasion when he was outside the restaurant talking to Tian Wen Ye while he picketed, a waiter named Steven came out and told Lin that the boss' wife wanted to talk to him. Lin immediately went into the restaurant and spoke to Yi Hue in the area where she packaged food for delivery. According to Lin, Yi Hui said, 'if you supprt Tian Wen Ye, then you don't work here.'" ALJD, page 6, lines 8 through 15.

The ALJ failed to note that if Lin's testimony was accurate, it was an admission on his part that he was on the picket line during his working hours. Picketing during working hours, after an employee has clocked-in and is being paid, is not protected activity under the Act. It was well within the Restaurant's lawful rights to tell Wen Dong Lin to get back to work at one of the busiest times of day for the Restaurant, even if that meant pulling him off of the picket line to make a delivery.

Respondent "has a legitimate interest in seeing that its employees perform their work well." Hochstadt v. Worcester Foundation for Experimental Biology, 543 F2d 222 (1st Cir. 1976). Section 7 of the NLRA preserves the right of employers to maintain discipline in their establishments, see e.g. Stanford Hosp. & Clinics v. NLRB, 325 f3d 324, 339 (D.C. Cir. 2003), and the rights afforded employees to engage in protected activities must be balanced by the respective rights of employees to maintain discipline and conduct their business. Id.

It is beyond dispute that the right of employees to engage in protected activities is not without limits. At the very least, employers are not required to pay employees for the time that they are off-premises, engaging in protected activities.

"[E]mployees have the right to engage in collective activities at their employer's place of

business in non-working areas during non-working hours." <u>Salmon Run Shopping Center LLC</u> v. NLRB, 534 F.3d 108 (2d Cir. 2008). "It is axiomatic that an employer is not required under the Act to finance an economic strike against it by remunerating the strikers for work not performed." <u>Texaco, Inc.</u>, 285 N.L.R.B. 241 (1987); <u>General Electric Co.</u>, 80 N.L.R.B. 510, 511 (1948).

Substantial testimony at trial established that the picketing always started around noon or just prior to noon, and lasted until around two p.m., thus corresponding with the Restaurant's lunch hour business, which plainly included the lunch order deliveries which Wen Dong was being paid an hourly wage to deliver. See ALJD at p. 5, lines 32-39.

Wen Dong Lin volunteered that on at least one occasion Yi Hui was required to send another employee into the picket line to bring Wen Dong Lin back inside. The Acting General Counsel elicited this testimony to support its position that Yi Hui was perceived as a manager of Respondent, and the ALJ found that Wen Dong Lin's compliance indicated that he perceived Yi Hui as someone with authority over the employees, ALJD p. 10, lines 20 – 27, and that Yi Feng ratified her statement on February 3, 2010. The preponderance of the evidence, however, established that he was picketing during his working hours, and she was merely doing her job by trying to get the deliveries she had packed into the hands of her customers.

It was clearly erroneous for the ALJ to accept Wen Dong Lin's veracity regarding the conversation between them, let alone make a finding of animus on Yi Hui's part that was thereafter ratified by Yi Feng.

C. Respondent would have taken the same action in the absence of Wen Dong Lin's protected Activity.

Assuming *arguendo* that the Board upholds the ALJ's findings on the foregoing issues, Respondent submits that it has met its affirmative defense, in that it would have taken the same action in this case in the absence of Wen Dong Lin's picketing activities in support of Tian Wen Ye.

Exception 7.

The ALJ erred in finding by a preponderance of the evidence that the two men were equally culpable and were therefore treated disparately. ALJD page 12, lines 21-28.

Wen Dong Lin admitted that he started the fight, when he saw that De Quan Lu was about to take two delivery orders, "one going east and one going west." Tr. page 122, line 4. He asked De Quan Lu, "You would deliver everything, then what do I deliver?" Tr. page 123, line 7.

Wen Dong Lin admitted that De Quan Lu "wanted to go. I didn't let him go.

And I said you have to apologize to me . . . " Tr. page 123, lines 16-18.

There is no dispute that Wen Dong Lin struck De Quan Lu (albeit Wen Dong Lin alleges that it was in self defense). There is no dispute that De Quan Lu wound up on the floor, suffered physical injuries, and missed over a month of work. There is no dispute that De Quan Lu instituted a civil action against Wen Dong Lin. There is no dispute that the altercation occurred during lunch hour, and that there were several eyewitnesses. It was entirely reasonable for Yi Feng to conclude that Wen Dong Lin was at the aggressor. It was entirely reasonable for Yi Feng to believe De Quan Lu's statement of what had transpired between the two men.

In N.L.R.B. v. Starbucks Corp., 697 F.3d 70 (2d Cir 2012), the Court of Appeals held that even though the NLRB had established a prima facie case that an employee's discharge was substantially motivated by an employee's union activity, and that some of the reasons cited for termination might have been pretextual, the NLRB had failed to recognize "strong evidence" that the employee would have been terminated even absent his union activities.

In the instant case, Respondent believes that the ALJ likewise ignored the strong evidence that Wen Dong Lin was the aggressor in a serious altercation, and that he had failed to do what he had been repeatedly told to do, which was to resolve his differences with De Quan Lu. Despite Yi Feng's mixed messages at trial, it does not take a divining rod to determine from his testimony that the only things the Restaurant wanted was for Wen Dong Lin to do the right thing vis-à-vis De Quan Lu, and to respect Yi Feng's authority by doing it.

Moreover, Yi Feng was hardly out of line for being persuaded by De Quan Lu's pleas for his job. The Acting General Counsel did much at trial to show that De Quan Lu was a feeble old man who would have trouble finding another delivery job. Respondent clearly did not feel that way; De Quan Lu had been successfully delivering orders since 2008, while simultaneously being a picket line organizer and picketer on his days off. The Restaurant had every prerogative to decide that it wanted to keep him on. This did not mean that Wen Dong Lin could not have his job back. But it did mean that he had to apologize to, and make peace with, De Quan Lu.

The Board has consistently held that "an employer need not prove that the employee committed an alleged offense. However, the employer must show that it had a

reasonable belief that the employee committed the offense, and that they acted on that belief they it discharged him." In re Mckesson Drug Company, 336 NLRB 935, 938 n.7 (2002).

In <u>Affiliated Foods, Inc.</u>, 328 NLRB 1107 (1999), the Board affirmed the ALJ's finding that, "based in part on reports which Respondent's management considered in making the discharge decision, Respondent had a reasonable, good faith belief that the three employees had engaged in misconduct . . ." <u>Id</u>. at 1108. The Board again confirmed that it is not necessary for a respondent to prove that the misconduct actually occurred to meet its burden under <u>Wright Line</u>.

Affiliated Foods cites GHR Energy Corp., 294 NLRB 1011 (1989) for the proposition that respondent met its Wright Line burden where it reasonably believed that employees had engaged in serious misconduct. Id. at 1012-13.

In this case the ALJ failed to adequately consider that a preponderance of the evidence had established that Respondent had a reasonable belief that there was greater wrongdoing on the part of Wen Dong Lin than on the part of De Quan Lu.

Exception 8.

In addition to the foregoing instances of Wen Dong Lin's lack of veracity, the ALJ did not discuss the suspicious nature of the timing of the filing of the Union's charge. Though and the Union on behalf of alleged discriminates Wen Dong Lin and Tian Wen Ye filed a charge against Respondent on February 12, 2010, the declaration portion of the charging document is actually dated January 22, 2010, three weeks earlier. In an act of seeming prescience, the charge states in its final paragraph that Respondent "refused and failed to rehire employee because he engaged in protected, concerted and union activities."

Respondent was totally unaware of the Union's decision to file a complaint on Wen Dong Lin's behalf until after it was filed and served, which would have been after February 12th. The query for the ALJ, which he erroneously failed to address, was whether Wen Dong Lin was already planning to raise his non-reinstatement as an issue on the date he conveniently "picketed at the door" and then allegedly walked back into the premises to again ask for his job. If so, then it would be Wen Dong Lin who manufactured the alleged pretext grounds by staging the February 3d events. That would explain why the charging document was prepared by the Union on January 22, but not filed until February 12, 2010.

Certainly, on January 11th no pretext ground for either his discharge or his nonreinsatement could have been plausibly raised by Wen Dong Lin, and in fact the Acting General Counsel conceded this. Thus, if the dates on the charge are to be believed, Wen Dong Lin needed to create a Section 8(a)(1) allegation between January 22 and February 12, 2012, which is what a preponderance of the evidence shows that he did.

Exception 9.

The ALJ erroneously concluded that Respondent's stated motives were pretextual, and that its true motivation for not reinstating Wen Dong Lin was his support for Tian Wen Ye. The pretexts, according to the ALJ, were the Restaurant's insistence at trial that it wanted to avoid further problems with Lu, who had hired a lawyer, and did not want the two men to work together until they settled their dispute. ALJD p. 12, lines 9-45.

First, as previously stated, the reasons given to Wen Dong Lin on February 3, 2010, were the very reasons Respondent originally gave to Wen Don Lin on January 11, 2010. The words that Yi Feng used on that day were almost identical to the words he used on February 3, 2010. There was no shifting explanation on Yi Feng's part.

Second, it is not unlawful for Yi Feng to articulate more than one motive, so long as they are neither inconsistent nor unlawful. Despite Respondent's inartful articulation, the record is crystal-clear that Respondent perceived De Quan Lu as a squeaky wheel, who had retained a lawyer and would cause problems going forward unless he was appeared. His potential damages for the injuries he allegedly sustained in the Restaurant which would have been a valid business reason to rehire him.

In addition, contrary to the ALJD, it was entirely reasonable for Yi Feng to conclude that Wen Dong Lin was more culpable than De Quan Lu. Wen Dong Lin was the clear aggressor, having physically assaulted De Quan Lu and knocked him to the ground. Yi Feng had heard the commotion and had seen De Quan Lu on the floor. De Quan Lu had collected workers compensation benefits during his one-month absence. Yi Feng was privy to the eyewitness accounts of the other people in the Restaurant on the day of the assault, spoke to the police, and later spoke to the two men. He was capable of making a determination that Wen Dong Lin was the wrongdoer.

The ALJ held that "The fact that he kept Lin working as a delivery worker while Lu was out for medical reasons suggest that Yi Feng was not too concerned with Lin's alleged aggression toward Lu." ALDJ at p. 12, lines 41 – 43. Respondent urges the Board to find this statement is not supported by a preponderance of the evidence. To Respondent it conveys the opposite motive: Respondent believed that it was safe for Wen Dong Lin to continue to work until De Quan Lu's medical leave ended, but then discharged Wen Dong Lin's employment as soon as there was a possibility that the two men would have to work together. It is not implausible to assume that Wen Dong Lin was kept on because the Restaurant would have been short-handed during the busy holiday season. Or, Yi Feng may

have believed that the men were indeed working things out with the Union – no one from the Union ever contacted him to discuss this – but realized that this outcome was unlikely when he learned that De Quan Lu had retained counsel. While these reasons were not explored at trial, Yi Feng's retention of Wen Dong Lin until January 11th is not evidence of pretext.

The ALJ also seemed to put much misplaced credence on the fact that the police issued summonses to both men on the day of the assault. This fact alone is hardly indicative of either man's respective culpability; nor does indicate of what Yi Feng ultimately concluded on this issue. He was under no burden to make a factual determination beyond a reasonable doubt, only to make a reasonable, good faith determination as to their comparative culpability.

These facts do not support a finding that Respondent's nonreinstatement of Wen Dong Lin was based upon pretext.

CONCLUSION AND RELIEF

WHEREFORE, Respondent Kawa Sushi Inc., respectfully requests that the National Labor Relations Board reject the findings of fact and conclusions of law rendered by Administrative Law Judge Michael A. Marcionese that Respondent violated Section 8(a)(1) of the Act when it failed to reinstate former employee Wen Dong Lin; that it render its own finding of fact and conclusions of law that Respondent did not violate Section8(a)(1) of the Act in the circumstances of this case; and that it enter an Order that the allegations

and claims addressed by Administrative Law Judge Marcionese in his September 19, 2012 Decision be dismissed with prejudice.

Dated: October 17, 2012

Respectfully submitted,

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